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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 LIVE BRANDS HOLDINGS, LLC,

4 Plaintiff,

5 v.

20 Civ. 1213 (AS)
Telephone Conference

6 GASTRONOMICO GRACIAS A DIOS,
7 SOCIEDAD RESPONSABILIDAD
8 LIMITADA de CAPITAL VARIABLE;
9 XAIME NIEMBRO ALVAREZ; PABLO
LOPEZ VARGAS; JOSE ENRIQUE
JIMENEZ BARCENAS; and OSCAR
HERNANDEZ SANTIAGO,

10 Defendants.

11 -----x

New York, N.Y.
August 21, 2023
2:00 p.m.

12
13 Before:

14 HON. ARUN SUBRAMANIAN,

15 District Judge

16 APPEARANCES

17 TRENAM KEMKER SCHARF BARKIN FRYE O'NEILL & MULLIS PA

18 Attorneys for Plaintiff

19 BY: JOHN D. GOLDSMITH

20 LAW OFFICE OF DAVID TENNANT PLLC

Attorney for Defendants

21 BY: DAVID H. TENNANT

-and-

LUPKIN PLLC

22 BY: JONATHAN D. LUPKIN

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(The Court and all parties appearing telephonically)

THE COURT: Good afternoon. This is Judge Subramanian. We are here in Live Brands v. Gastronomico Gracias a Dios, docket No. 20 Civ. 1213. Could I please have appearances from the parties.

MR. GOLDSMITH: Yes, your Honor. May it please the Court, John Goldsmith. I represent the plaintiff, Live Brands.

MR. LUPKIN: Good afternoon, your Honor. Jonathan Lupkin from the firm of Lupkin PLLC on behalf of the defendants.

THE COURT: Great. Good afternoon to everyone --

MR. TENNANT: I'm sorry, your Honor, to interrupt. It's David Tennant. I'm also counsel to the defendants.

THE COURT: Good afternoon, Mr. Tennant.

So as I understand it, we are post discovery. Neither of the sides have filed motions for summary judgment. So we're here, ready for trial; is that correct?

MR. GOLDSMITH: From the plaintiff's perspective, yes.

MR. LUPKIN: Yes --

THE COURT: Mr. Goldsmith -- why don't we do this in sequence, because we do have a court reporter and I want to make sure that the record is clear.

Mr. Goldsmith, from your perspective, is the plaintiff prepared for trial? And what would your proposal be as to the scheduling of that trial?

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1 MR. GOLDSMITH: Your Honor, the plaintiff is prepared
2 and ready to go to trial. We believe the case will take three
3 to five trial days, depending on the length of jury selection.
4 We propose a trial in November.

5 THE COURT: Okay. And let me turn to the defendants.

6 Mr. Lupkin or Mr. Tennant, do you want to take the
7 lead and tell me, from the defendants' perspective, what your
8 view is.

9 MR. LUPKIN: Yes. Thank you, your Honor. Jonathan
10 Lupkin on behalf of the defendants.

11 We are ready to go to trial, but with one caveat. We
12 indicated in our status letter that we believe there are a
13 couple of issues that would, if granted, be dispositive and
14 obviate the need for trial. I recognize that would probably be
15 in the nature of a summary judgment motion. I've just been
16 retained within the last week, but it seems to me that there
17 would be efficiencies if we could resolve this without the
18 trial, but if the Court is disinclined to do that, we're
19 prepared to go to trial in November or December.

20 THE COURT: What are those issues?

21 MR. LUPKIN: It's really one issue, your Honor. It's
22 a question of election of remedies. We pleaded the affirmative
23 defense in our second amended complaint, paragraph 64. The
24 claim is very simple. There is an MOU here that is the subject
25 matter of this lawsuit. There were certain payments made in

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1 connection with the memorandum of understanding. In connection
2 with those payments, there were promissory notes given by my
3 client, GAD, Gastronomico Gracias a Dios, to secure the
4 payments of those notes in the event that the final definitive
5 agreements did not come to fruition. They did not. The trial
6 here involves whether or not there's been a breach of the
7 contract, and if so, what the remedy would be.

8 Separately, the plaintiff brought suit to enforce the
9 terms of those notes in Mexico during the pendency of this
10 case, secured a judgment, and has collected on, I believe it's
11 100 percent of the amount of the notes that were sued upon.
12 Our view is that the suit and collection upon those notes is an
13 election of remedies, and having elected to pursue the recovery
14 of that money, the case should -- that's basically all there is
15 to it. They've elected their remedies, they've secured their
16 recovery, and the case should not go forward on that basis
17 alone.

18 THE COURT: And why wasn't this issue raised before
19 the Court by the summary judgment deadline?

20 MR. LUPKIN: I can't answer that question, your Honor.
21 Again, I was retained within the last week, but I can turn the
22 issue over to Mr. Tennant, who was here, with your permission.
23 I know that you typically have only one person speak, but under
24 the circumstances, there's not an entire overlap of history
25 here.

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1 THE COURT: Maybe just for my benefit you can clarify,
2 Mr. Lupkin. Are you solely representing Gastronomico, the
3 enterprise?

4 MR. LUPKIN: No, I've come in as trial counsel.

5 THE COURT: For all the defendants?

6 MR. LUPKIN: Yes.

7 THE COURT: So you represent all the defendants.

8 Mr. Tennant, are you only representing a subset of the
9 defendants or all of the defendants?

10 MR. TENNANT: All of the defendants, your Honor.

11 THE COURT: So if I understand it, Mr. Tennant, you've
12 been with us in this case for longer than Mr. Lupkin, but
13 you're both representing the same client; right?

14 MR. TENNANT: Correct.

15 THE COURT: Mr. Tennant, then, can you explain why
16 your clients did not file this motion summarized by Mr. Lupkin
17 by the summary judgment deadline?

18 MR. TENNANT: Yes, your Honor. We did raise it with
19 Judge Cronan back in November and December of last year, and it
20 was going to be a successive motion to dismiss because it was a
21 motion to dismiss on other grounds that was pending.
22 Judge Cronan denied the motion without prejudice to it being
23 refiled as he took time to reach the first motion to dismiss,
24 which he denied.

25 In terms of what's happened since, we've had an effort

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1 to mediate the case. Opposing counsel wanted to have a meeting
2 between the parties in order to pursue settlement negotiations.
3 That kind of followup to the mediation never happened.

4 Basically, plaintiff went into radio silence in terms
5 of the case. We were thinking that the case may have just gone
6 away on its own. Having taken the view that this case really
7 had no legs in the first place and then plaintiff said okay,
8 we're going to trial, and it's like, okay, well, you know, so
9 be it, we'll go to trial, as well. But, you know, it was no
10 intent to waive any rights here to bring a dispositive motion,
11 but our client has limited resources and was going to take time
12 and energy to put together a summary judgment motion, which did
13 not appear to us even to be necessary in light of plaintiff's
14 failure to prosecute the case.

15 THE COURT: I hear you, Mr. Tennant, but you are not
16 asking for permission to file that precise motion, and there
17 was a deadline in the schedule, and I'm not hearing that you or
18 your clients or maybe your cocounsel reached out to the
19 plaintiff to determine what the status of the case was as you
20 have in connection with the joint letter that I asked and the
21 parties dutifully submitted. So I don't know if that's an
22 excuse.

23 But let me ask a different question. If I were to
24 deny the right to file this dispositive motion, how does that
25 election of remedies issue get presented? Meaning, would that

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1 be an issue that you would then present to the jury in this
2 case?

3 MR. TENNANT: Your Honor, and maybe Mr. Lupkin wants
4 to address this, but it's our view that the election of
5 remedies is an affirmative defense and we think it would be for
6 the Court to decide.

7 MR. LUPKIN: This is Mr. Lupkin speaking.

8 In the first instance, we think it's a matter of law
9 for the Court to decide. We don't think that there are any
10 real disputed issues of fact. But ultimately, if we had to
11 present it to the jury, we would present the facts that support
12 our claim for election of remedies and then the jury would be
13 in a position to determine whether or not those facts have been
14 established.

15 THE COURT: Thank you, Mr. Lupkin.

16 Is your client involved in the Mexico litigation that
17 is kind of at the heart of this election of remedies issue or
18 are there other parties, separate parties that are in that
19 case?

20 MR. LUPKIN: My understanding, and Mr. Tennant will
21 correct me if I'm wrong, is that all of the parties that are
22 involved in this case were also involved in the Mexican case.

23 THE COURT: So let me turn to Mr. Goldsmith.

24 First, Mr. Goldsmith, if you could provide me with
25 your reaction to the defendants' argument concerning this

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1 election of remedies issue and the request to file a
2 dispositive motion on that issue; and second, if you could just
3 provide me with a more fulsome explanation of what happened in
4 the Mexico litigation, I would appreciate it.

5 MR. GOLDSMITH: Okay. Thank you.

6 So, your Honor, with regard to the election of
7 remedies, we certainly disagree with a good amount of what
8 Mr. Tennant said, and we disagreed with him when we had
9 conversations outside of the context of the court pleadings
10 with regard to precisely what the litigation in Mexico was and
11 what it related to, and whether or not what happened in Mexico
12 factually, as well as legally, can constitute an election of
13 remedies.

14 And this is an issue that we think, number one, there
15 are going to be, at least from what I hear Mr. Tennant saying
16 and from what I understand has happened in Mexico, I think
17 there certainly will be factual issues in dispute if that's
18 what they're going to present. If they've asserted this as an
19 affirmative defense, they have the obligation to present that
20 defense and to present the evidence and facts to support that.

21 These were not notes, these are special obligations
22 under Mexican law that are unique to Mexican law. They are
23 sometimes defined by people who practice in both the U.S. and
24 Mexico — I do not — but they are sometimes defined as
25 confessions of judgment on steroids. So these are obligations

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1 that they agree to enter into that are independent of the
2 amounts and what are at issue in this case. But regardless of
3 whether or not they are independent or they are related to the
4 underlying obligations, our clients are still entitled to the
5 relief that we are seeking in this case.

6 What happened in this case is that we entered into an
7 agreement, it was called a memorandum of understanding. What
8 it specifically said is it's legally binding and enforceable.
9 Essentially, what we did is we provided a large amount of money
10 to the corporate defendant because they did not have the
11 resources to build out their production facilities in order to
12 distribute the product, the Mezcal product in the United
13 States. We, in exchange for that, the agreement was that we
14 would then own 50 percent of the corporate defendant where a
15 new entity would be formed and the assets -- and all of the
16 assets of what go by the initials, the acronym GAD would be
17 transferred to that entity and we would own 50 percent and the
18 current owners of GAD would own 50 percent. We have
19 substantial risk in making this investment because we're
20 dealing with a Mexican company. We had no ability to secure
21 that obligation. In exchange for that, they agreed to provide
22 us a 50-percent interest. And they also agreed that we would
23 have the exclusive rights to market this product, the Mezcal
24 product in the United States.

25 THE COURT: So Mr. Goldsmith, I'm going to stop you

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1 right there.

2 As I understand it, the memorandum of understanding is
3 at issue or was at issue in the Mexico case; correct?

4 MR. GOLDSMITH: It was not, no. The memorandum of
5 understanding was not at issue, it did not come up, it had
6 nothing to do with the issues raised in that case. The
7 memorandum of understanding does not reference the obligations
8 that were at issue in Mexico.

9 THE COURT: So let me just -- hold on for just a
10 second.

11 So Mr. Lupkin or Mr. Tennant, in the answer that you
12 filed in March of this year, your second affirmative defense is
13 election of remedies, and there in paragraph 64, you indicate
14 that in this other proceeding, Live Brands chose the remedy of
15 restitution of monies paid under the MOU, and that for that
16 reason, there's preclusion on this effort to enforce the MOU.
17 So it seems from your answer that your position is that the MOU
18 was at issue in the Mexican proceeding. So I want to see if we
19 can figure that out.

20 MR. LUPKIN: I'm sorry, your Honor. This is Jonathan
21 Lupkin. When you say --

22 THE COURT: Let's make it very clear. Mr. Goldsmith,
23 I just asked him whether the MOU was at issue in the Mexico
24 litigation and he said no. In your answer in this case, you
25 say yes. So what is the basis of your understanding that the

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1 MOU was in fact at issue in the Mexico litigation?

2 MR. LUPKIN: Well, the answer is I'd like to go back
3 to what Mr. Goldsmith said about there was no ability to secure
4 it in Mexico, these investments. The response that I have is
5 the way to secure it was precisely the way they did secure it,
6 with these notes.

7 THE COURT: Hold on, Mr. Lupkin. I appreciate the
8 discussion, but first, just basics. The MOU, was that issue in
9 the Mexico litigation or not, and then I'll let you explain.

10 MR. LUPKIN: The answer is it was just a suit on the
11 notes. The MOU was not included in the notes, no.

12 THE COURT: Okay. Continue.

13 MR. LUPKIN: But as a factual matter, these notes were
14 signed as, I guess, the American equivalent of confessions of
15 judgment, as I understand them, to secure the payments. The
16 evidence will show in this case that the payments that were
17 made to GAD were followed shortly thereafter in time with the
18 execution of these notes. So they're linked to one another as
19 a matter of practicality.

20 I'm not going to say to you that the MOU or, indeed,
21 the notes reference the other, but as a practical matter, the
22 evidence will show that these notes were in the amounts that
23 were lent, advanced by the plaintiff in this case, and were
24 followed shortly thereafter with the execution of the notes.
25 So our position -- and we are not aware of any other debt

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1 obligation that GAD would owe to the plaintiff in this case,
2 but for the existence of these advances.

3 THE COURT: Thank you.

4 Mr. Goldsmith, what is, as I understand defense
5 counsel, they say there are these notes out there and that they
6 represent restitution to your client, we'll put aside for the
7 moment whether that's restitution on the basis of the MOU at
8 issue here or some separate instruments that are not connected
9 to the MOU, but they say that you've received the remedy of
10 restitution. So let's focus on this case where you are suing
11 to enforce the MOU. Is there a damages calculation that you've
12 provided to the defendants? What is the actual amount that
13 this trial would focus on? What are you going to be asking the
14 jury for?

15 MR. GOLDSMITH: Your Honor, I apologize, but as I sit
16 here today, I cannot tell you what that amount is. I would
17 need to talk with my client and I could tell you approximately
18 what it is, but I'm going to be -- I'm not going to be within
19 or I may not be within 30, 40 percent. So that's the answer to
20 that question.

21 But I want to respond, if I could --

22 THE COURT: Let's focus on that for a second. I'm
23 looking at the docket here. Did the parties exchange
24 Rule 26(a) disclosures in this case?

25 MR. GOLDSMITH: We did.

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1 THE COURT: Mr. Goldsmith, in your 26(a) disclosure
2 where you needed to calculate damages, what did you tell the
3 defendants was the calculation of the damages here?

4 MR. GOLDSMITH: Your Honor, I am looking that up right
5 now. I apologize. My computer's a little bit slow and
6 catching up to me.

7 THE COURT: That's fine, Mr. Goldsmith. Let's hold
8 off because I have a couple more questions and then I'll give
9 you time to find the answer to that question.

10 So my separate question concerns the individual
11 defendants who are in this case. Now, as I'm looking at the
12 MOU, it does not appear that those individual defendants are
13 parties to the MOU, and I believe that when Judge Cronan denied
14 in part the motion to dismiss, one of the issues he ran into
15 and the questions he had was why the individual defendants
16 would be liable on a cause of action on a contract they were
17 not parties to, and he urged your client to consider whether
18 those individual defendants should be in the case and cautioned
19 you that any claims against the individual defendants would
20 need to have a good-faith basis in the law and facts here. So
21 given that the only claim being asserted is breach of contract
22 and the individual defendants are not parties to the contract,
23 what's the basis of the claim against those individuals?

24 MR. GOLDSMITH: So under the MOU, they are required
25 to -- each of the individuals who are the owners of the

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1 corporate defendant are required to contribute all of their
2 ownership of GAD to a newly formed entity, and they refused to
3 do that. And so, we are suing them for specific performance to
4 require them to comply with the terms of the agreement that
5 they benefited from because we contributed the money that
6 allowed GAD to expand its production facilities.

7 THE COURT: Right. But what's the legal basis -- I
8 understand the relief that you are seeking from the individual
9 defendants. My question is: What is the legal basis for you
10 to pursue relief directly against them given that your claim
11 sounds in contract. If you told me that you are seeking an
12 order for the defendant company, Gastronomico, to use its
13 powers to secure this relief from the individual defendants,
14 that's one thing, but what is the legal basis to get that
15 relief directly from the individual defendants?

16 MR. GOLDSMITH: Well, the reason that we're seeking
17 against the individuals is that the company probably cannot
18 compel the defendant, the individual defendants to sign the
19 documents, but the company contractually agreed, they agreed
20 and approved and agreed to do it. So I think it's in the
21 nature of a third-party beneficiary theory, that they have --
22 they are benefited directly by this agreement because we
23 allowed the company that they collectively owned to
24 substantially increase its production capacity, as well as
25 significantly increased their market share in the United States

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1 by our efforts, and that as a result of that, they are -- they
2 should be required to sign to -- to comply with the terms of
3 the agreement because, again, this was a memorandum of
4 understanding. I think that what we have to establish for a
5 third-party beneficiary is existence of a contract, that the
6 contract was intended to benefit them, and the benefit is
7 immediate. We believe that we can establish that. We believe
8 that their presence in the case is necessary in order to get
9 effective relief. And I believe, you know, this was -- the
10 defendants elected not to file a motion to dismiss our amended
11 pleading directing to that, but I believe we could point to law
12 that allows us to assert these claims against them in order for
13 us to receive full relief on a type of third-party beneficiary
14 provision.

15 THE COURT: Thank you, Mr. Goldsmith. And I
16 appreciate what you say about there not having been a motion
17 directed to this issue by the defendants. I realize that they
18 did answer the complaint and did not file a summary judgment
19 motion here.

20 So here is what I am going to do, and this will be
21 reflected in an order placed on the docket. I am going to set
22 a schedule for letters to be submitted on the election of
23 remedies issue that the defendants would like to file a
24 dispositive motion about. I will tell you in advance that not
25 only based on the procedural default missing the summary

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1 judgment deadline, but also given the discussion of the issue,
2 which seems to raise factual issues, I'm inclined to not permit
3 defendants to file a successive dispositive motion having not
4 filed one by the deadline. We'll issue an order, I'll take a
5 look at letters from both sides on that issue, and if there
6 needs to be motion practice, we can handle that.

7 I will set a trial date in this case and I will set it
8 for trial on November 6th. So that week, you're not going to
9 have the whole week to try this case. I don't think, based on
10 what I reviewed, you're going to need the whole week. I agree
11 that this is something that can probably be tried in three days
12 ideally, but we'll set it for November 6. So you should put
13 that in your calendars. We will send out an order that sets
14 dates for pretrial filings that are specified in our individual
15 practices and that will need to get ready for trial.

16 In connection with getting ready for trial, what I'll
17 say to Mr. Goldsmith, to you, is that if you do not have a
18 sound legal basis -- I understand there was no motion directed
19 to this issue, but if you feel like there's not a sound basis
20 for relief against the individual defendants, then just in the
21 interest of narrowing and sharpening the issues for trial, you
22 should consider whether all of the defendants need to remain in
23 this case. So that's moving us closer to trial.

24 Let's talk for a second about settlement. I know that
25 there was a mediation session that was unsuccessful previously

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1 in this case, but now we're at the doorstep of trial. It seems
2 like there's a long history here in this case, but I want to
3 make sure that the parties have spoken about settlement.

4 So why don't we start with the defendants here since,
5 Mr. Goldsmith, you've been helping us out here. Mr. Lupkin or
6 Mr. Tennant, is there any possible resolution here short of a
7 trial?

8 MR. LUPKIN: Mr. Tennant, you want to take this one?

9 MR. TENNANT: Sure.

10 Thank you, your Honor. It's David Tennant.

11 We had, as you indicated, a mediation session that was
12 not productive. It was actually plaintiffs suggesting at the
13 close of the mediation to have party-to-party negotiations, and
14 we followed up with that several times and it went nowhere, no
15 response from plaintiff's counsel. I don't know if there is an
16 opportunity for the parties to get together. I had
17 specifically asked that the -- if there were to be such
18 party-to-party negotiations, that the mediation protocols
19 concerning the confidentiality would apply to those
20 party-to-party communications. I'm not optimistic about the
21 opportunities that would lie with party-to-party
22 communications, but we're still open to that suggestion.

23 THE COURT: Mr. Goldsmith, would you and your client
24 be open to those discussions?

25 MR. GOLDSMITH: Yes, your Honor. And I think -- I'm

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1 not sure if something got lost in cyberspace, but I sent two
2 emails, including one a few weeks ago to Mr. Tennant providing
3 him the contact information for his clients to reach out to the
4 individuals that are involved in the marketing for these type
5 of products, which is what we had agreed to do, was to see --
6 we thought that a settlement could be -- could involve or could
7 start with the fact that my clients were much more successful
8 in marketing the product than after they cut us off and they
9 started marketing, and we thought that the people that we used,
10 they could talk to first to see if that might begin the process
11 of a discussion. I had provided that information to
12 Mr. Tennant when he got back to me and apparently had not
13 received it. I sent him another people email a few weeks ago.
14 So I think we can certainly do that and see if we can be, you
15 know, see if that might be successful, but -- so we're always
16 happy to try to see if there's something that we could do to
17 work it out.

18 THE COURT: I appreciate that.

19 This is a case that I think is amenable to settlement
20 and I think should settle. So I am going to, as part of the
21 order that we issue, ask the parties to meet and confer with
22 each other on the issue of settlement. And when I say meet and
23 confer, I mean a real meet and confer where people are talking
24 either in person or over the phone directly about whether this
25 case can be resolved. If there is any order or protocol that

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1 you need me to put in place concerning confidentiality, I'm
2 happy to do that. Of course the Federal Rules of Evidence
3 already provide a lot of protection on settlement
4 communications and the ability for those settlement
5 communications to be used during trial. I can tell you that if
6 any party tried to use settlement communications here at the
7 upcoming trial, I will not take kindly to that. This is the
8 Court's directive to have the parties have a good faith meet
9 and confer on these issues.

10 So that order will issue either today or, at the
11 latest, tomorrow so you have a sense of what you need to do
12 moving forward and you can start getting ready for trial and
13 also have the settlement discussions and we'll take it from
14 there.

15 Are there any questions?

16 MR. LUPKIN: Yes, there is, your Honor. Thank you.
17 May I be heard briefly on the trial date?

18 THE COURT: Sure.

19 MR. LUPKIN: Again, I'm new to the case. I have a
20 longstanding vacation with, among other things, two of my
21 daughters who live abroad, and I will only be returning the
22 week prior to that. So if the Court and counsel on the other
23 side would be amenable or willing, if we could just push it a
24 couple of weeks into later in November so I am not under the
25 bum's rush when I see my daughters, who I only get to see a

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1 couple of times a year.

2 THE COURT: Well, I'm happy to move it a week to the
3 13th. Would that help on your end? So you'll have two weeks.

4 MR. LUPKIN: It certainly does.

5 THE COURT: We'll set it for the 13th instead of the
6 6th, and that will give you an extra week, and I appreciate it.

7 Mr. Goldsmith, anything from you on the plaintiff's
8 side?

9 MR. GOLDSMITH: No, your Honor, we have no objection
10 to the 13th. That works a little better for me anyway.

11 THE COURT: Perfect. Well, I appreciate the parties'
12 good work here and, again, I hope you can have some good
13 discussions concerning resolution of this case, and if not, we
14 will have trial in November. I will issue the order that I
15 mentioned about the letters on the election of remedies issue,
16 and we'll also work on the pretrial deadlines that the parties
17 will need to follow.

18 Anything else?

19 MR. LUPKIN: Yes, there's one other thing. You had
20 mentioned the Rule 26 disclosures on the calculation of
21 damages. I just pulled them up and, as I'm looking at them, I
22 don't see any concrete calculation of damages other than just,
23 you know, categories of damages. I would ask that, as part of
24 the pretrial order, there would be an articulation as to what
25 the precise damages are and what components they fall into.

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THE COURT: Any problem with that, Mr. Goldsmith?

MR. GOLDSMITH: No, your Honor. And he's correct, I did pull it up and we have -- we describe in detail what the categories of damages are, but we don't do a calculation.

THE COURT: And because, obviously, that may be an issue that the parties would appreciate clarification about in the context of discussing settlement, I may ask that that be addressed in the letters that we previously discussed. Okay?

MR. GOLDSMITH: Thank you.

MR. LUPKIN: Thank you, your Honor.

THE COURT: Thank you, everyone. We are adjourned.

* * *